

THE CONSUMER & GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT TO  
REFRESH THE RECORD ON THE COMMISSION'S RULES GOVERNING INTERSTATE  
PAY-PER-CALL & OTHER INFORMATION SERVICES  
CC DOCKET NO.: 96-146

**COMMENTS  
OF  
HFT, INC.  
LO-AD COMMUNICATIONS  
T.B.I.  
and  
GLOBAL CHARGE**

May 12, 2003

**BACKGROUND**

The Federal Communications Commission ("the Commission") has requested public comment from interested parties to "refresh the record" concerning the Commission's Order and Notice of Proposed Rulemaking ("NPRM") to amend the Commission's Pay-Per-Call Rule. These comments are submitted on behalf of the above-captioned companies, hereinafter referred to as "Companies," providing domestic and international information services.

The Commission originally requested comments back on July 16, 1996, fast approaching 7 years ago. At that time, the Commission required interested parties to adhere to strict time frames for filing opening comments and replies. The response was significant. Despite expressly recognizing that the overwhelming majority of abuse of the pay-per-call system arose in the context of 800 numbers<sup>1</sup>, the Commission did its level best to raise the specter of the information services boogeyman, clinging to the prospect of "possible" as opposed to actual abuses by providers of services rendered at "usual and customary" toll rates.<sup>2</sup> The Commission's response

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<sup>1</sup> Callers dialed numbers widely recognized to be toll-free, only to be lured into a sequence of elaborate dialing patterns which transferred them to providers charging exorbitant per-minute charges.

<sup>2</sup> NPRM, ¶¶ 13, 14, 42, 45, 47

for the past 7 years was appropriate: do nothing, giving credence to the old saw, “If it ain’t broke, don’t fix it.” Indeed, the information services boogeyman never reared his head. Indeed, he never existed.

The proposed changes include a provision in which the Commission attempts to redefine the Congressional definition of “pay-per-call” services in dragnet fashion to include services such as those provided by the Companies. The proposed rule change is seriously flawed, as it is well in excess of the Commission’s authority, anti-competitive, over-broad, unduly restrictive, violates the First Amendment to the U.S. Constitution, and clearly exceeds the scope and intent of the Telecommunications Act of 1996. The proposed rule change, if enacted, will encourage increased dominance by the major carriers, inhibit growth of diverse services available to the general public, increase prices to consumers, and chill the free exchange of thoughts and ideas, in violation of the First Amendment. For these reasons, the FCC should abandon its proposed rule change.

## **I.**

### **THE PROPOSED CHANGES EXCEED THE COMMISSION’S AUTHORITY.**

Congress clearly defined pay-per-call services in 47 U.S.C. § 228 (I), set forth as follows:

The term pay-per-call services means any service--

(A) In which any person provides or purports to provide--

(I) Audio information or audio entertainment produced or packaged by such person;

(ii) Access to simultaneous voice conversation services; or

(iii) Any service, including the provision of a product, the charges for which are assessed on the basis of the completion of the call;

(B) For which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call; **and**

(C) Which is accessed through the use of a 900 number or other prefix designated by the [Federal Communications] Commission in accordance with [47 U.S.C. § 228 (b)(5)]. (Emphasis added.)

The bulk of § 228 is devoted to abuses in the toll-free marketplace.

At ¶ 48 of the NPRM, the Commission states:

Pursuant to [47 U.S.C. § 154 (I)] of the Communications Act, we tentatively conclude that when a common carrier charges a telephone subscriber for a call to an interstate information service, any form of remuneration from that carrier to an entity providing or advertising that service, or any reciprocal arrangement between such entities, constitutes per se evidence that the charge levied exceeds the charge for transmission. Accordingly, interstate services provided through such arrangements would fit within the pay-per-call definition and, thus, be required to be offered exclusively through 900 numbers. We invite comment on this tentative conclusion and, also, as to whether, in any event, such conduct by a common carrier is just and reasonable.

Contrary to the Commission’s underlying premise, neither 47 U.S.C. § 154 (I) nor 47 U.S.C. § 201 (b) is authority for the Commission to do whatever it pleases whenever it pleases to rectify whatever evil it imagines to exist in the world of telecommunications. 47 U.S.C. § 154 (I) provides that

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

Congress has already clearly defined pay-per-call and requires that the caller must pay a per-call or per-time-interval charge that is greater than or in addition to the charge for the transmission of the call in order for the pay-per-call moniker to be hung on a provider. What the Commission is proposing, is to redefine pay-per-call in a manner which is inconsistent with the definition Congress gave it, in violation of 47 U.S.C. § 154 (I).

Nor does the Commission have the power or the authority to do so. Congress expressly granted the Federal Trade Commission authority to extend the definition of pay-per-call services to other “similar services.”<sup>3</sup> 15 U.S.C. § 5714 (a) provides as follows:

The term "pay-per-call services" has the meaning provided in section 228 (I) of title 47, except that the [Federal Trade] Commission by rule may, notwithstanding subparagraphs (B) and ©) of section 228 (I)(1) of title 47, extend such definition to other similar services providing audio information or audio entertainment if the [Federal Trade] Commission determines that such services are susceptible to the unfair and deceptive practices that are prohibited by the rules prescribed pursuant to section 5711 (a) of this title.

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<sup>3</sup> HFT’s recognition here of the FTC’s authority should not be construed as a change in position from the FTC’s pay-per-call rule review that Congress’s delegation of legislative power was unconstitutional.

It is noteworthy that Congress granted the FTC the authority to revise the definition of Pay-Per-Call, provided certain findings are made, supported, of course, by facts. However, Congress did not grant the Commission the same or even similar authority. This expression of Congressional intent is inescapable. Rather than using the kitchen sink concept of “just and reasonable” embodied within § 201 (b) to legislate where it sees fit, the Commission should respect Congress’s division of responsibility and recognize that if Congress had wished for the Commission to have the authority to redefine pay-per-call services in the manner which the Commission proposes, Congress no doubt would have enacted a statute using language similar to that found in 15 U.S.C. § 5711 (a). The fact that Congress did not grant the Commission such authority is proof positive that it did not intend to do so, and is ample grounds, in and of itself, to convince the Commission to abandon its ill-conceived plan to exceed its authority.<sup>4</sup>

Both Houses of Congress and the President of the United States have already spoken quite clearly on the topic of pay-per-call services. The overriding evil occurs when consumers **unknowingly** wind up paying **excessive** charges for the **content** of the information or entertainment services received. The Commission seeks to expand its authority and include services **provided at reasonable and customary toll rates**. The fact that providers can make a profit when services are provided to consumers for only the cost of the call underscores the need

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<sup>4</sup> Precedent abounds for the proposition that the Commission’s authority to propose and implement rules requires a specific statutory basis rather than any general inherent equity power. *FCC v. RCA Communications*, 346 U.S. 86 (1953); *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1988). The FCC may not rewrite a statutory scheme enacted by Congress on the basis of its now interpretation of the equities of a particular situation. *MCI v. FCC*, 765 F.2d 1186, 1195 (D.C. Cir. 1985).

and demand for these services.

## II.

### THE PROPOSED RULE WILL IMPOSE AN UNCONSTITUTIONAL BURDEN ON FREE SPEECH.

#### A. *A De Facto Content-Based Restriction*

"Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. A.C.L.U.*, 117 S.Ct. 2329, 2344 (1997). Indeed, the First Amendment was designed to prevent the majority, through Acts of Congress, from silencing those who would express unpopular or unconventional views. Through the use of its proposed change in the 900-number rule, the Commission unabashedly and unapologetically seeks to silence the voice of the town crier in Americans most in need of an open, convenient, and affordable forum for the free, unfettered expression of divergent views.

All of the Companies' domestic and international services include numerous conference lines devoted to providing a voice to segments of society which go largely without an opportunity to be heard. The Companies provide a safe, clean environment for people from diverse groups to share common interests and to exercise their constitutional rights to freedom of association and speech. The Companies provide a forum for the free flow of information to segments of society which may, if not encouraged, go without needed information.

Unfortunately, the Commission feels this style of communication is undeserving of the unencumbered free speech rights which other forms of communication enjoy. Exempt from the scope of the proposed changes are common carrier directory services, telecommunications services for the deaf, and the purchase of goods or services which are not "information services".

47 U.S.C. § 228 ©) (8) (d). 47 C.F.R. 1504 (f) (1). The result of this arbitrary classification is that the Commission has decided that certain messages are "good and pure," deserving of unfettered public access, while other constitutionally-protected messages, such as those provided by the Companies are "bad and evil," and thus to be discouraged, wrongly labeled with the scarlet numbers "9-0-0", and unduly burdened with unnecessary regulatory preambles and other hindrances established by the 900-number arena. Make no mistake, the proposed rule, in effect, eliminates the entire domestic and international ("one plus" and 011 dialing patterns) long distance forums as a meeting place for the free flow of ideas between individuals with common interests unless those participants agree to give up substantial privacy rights. Of course, this action is unconstitutional.

**B. An Unconstitutional Financial Disincentive to Free Speech**

Regulations which permit the government to discriminate on the basis of the content of the message will not be tolerated under the First Amendment. *Regan v. Time, Inc.*, 468 U.S. 641, 650 (1984). A statute which has the **effect**<sup>5</sup> of deterring speech, even if not totally suppressing speech, is a restraint on free expression. (Emphasis added.)

*A.C.L.U. v. Reno, supra*, citing *Fabulous Associates, Inc. v. Pennsylvania P.U.C.*, 896 F.2d 780, 785 (3d Cir. 1990). By permitting certain entities to continue to deliver their messages under the current system, while compelling other speech-based businesses, such as these commenting Companies, to carry the label of and incur the cost of switching over to the 900-number system and/or entering into pre-subscription agreements and thus increasing the cost of message

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<sup>5</sup> Note the obvious lack of an "intent" requirement.

transmission among consumers, the Commission commits an act no different in principle than if it had attempted to require Democratic political commentators to pay a registration fee before appearing on television while exempting Republican political consultants from having to pay the registration fee. E.g., *Simon & Shuster v. Crime Victim's Board*, 502 U.S. 105 (1991) (financial burdens operating as a disincentive to speech impermissible).

The First Amendment plainly prohibits the Commission from favoring one information provider over another based upon the content of the message. The proposed rule, in conjunction with the dramatic increase in cost to consumers which must result from being thrust into the 900-number arena and/or having to deal with the cost and cumbersome nature of pre-subscription agreements will discourage many consumers from utilizing the Companies' services and those of other similar-situated information providers, while completely preventing other consumers from gaining access to this vibrant and limitless source of information. *Reno v. A.C.L.U.*, 117 S.Ct. 2329, 2337 (1997). **"[G]overnment regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it."** *Id.* at 2351. The proposed regulations will undeniably and prohibitively increase the cost of information transmission and hence discourage and hinder individuals' and society's right to receive information of public interest necessary to the sustenance of an intelligent, well-informed populace. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

### **C. The Motive**

One need only look back to 1989 to uncover the genesis of the FCC's not-too-veiled agenda. In *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1999), the Supreme Court overruled attempts by the FTC and the FCC to unconstitutionally control the free-flow of

information by restricting adults from engaging in "indecent", as well as obscene communications over telephone lines. The FTC's and FCC's attempt to ban, outright, indecent telephone messages violated the First Amendment, despite the government's attempt to sell the Supreme Court the idea that it had a compelling interest to do so; that is, to protect minors from exposure to indecency. Since that time, both the FTC and the FCC, acknowledging that any future attempt to explicitly control the content of telephone communications would be struck down as unconstitutional, have attacked the same communications obliquely by imposing regulations and rules on an industry which has created a forum for the expression of views which the government feels is, at certain times, inappropriate. The proposed redefinition of pay per call is just the latest attempt by the FTC to carry out its goal of "... silencing those who would express unpopular or unconventional views." *A.C.L.U. v. Reno, supra*. The FTC should acknowledge the inappropriateness of pursuing a course of conduct which operates in essence to squelch the free-flow of information that certain segments of society simply consider meritless. Freedom of the press should not be limited only to those who own one. (*A.C.L.U. v. Reno*.) Imposing the type of financial burdens that will necessarily result as a consequence of the rule change does just that.

**D. Less Onerous and Restrictive Means Are Available.**

Even if the statutory and regulatory scheme could be viewed as content-neutral, which they cannot, it is readily apparent that less onerous, restrictive, and deliberately disruptive means are available to advance the Commission's apparent, yet plainly inappropriate, goal of protecting us from ourselves. Banning information services from the "one plus" and "011" marketplace is simply unacceptable. Unjustified and unduly burdensome disclosure requirements will always

chill protected free speech. Far simpler, economical, and effective than the 900-number arena, with its associated preamble, lack of access to the international market, lack of deniability and lack of portability, would be the requirement of a conspicuous and straight-forward written disclosure on print advertisement:

**ORDINARY TOLL CHARGES WILL APPLY; CHECK WITH YOUR LONG-DISTANCE CARRIER FOR RATES.**

This would rectify the Commission's apparent concern: that the American public is too ignorant to realize that a call to another area code or another country is not a free call.

The Commission cannot justify the proposed change and the ensuing impact it will have upon consumers' free speech and free association rights. The marketplace of ideas which have defined the rich history of American thought takes a back seat to no tribunal.

**III.**  
**THE PROPOSED RULE CHANGE IS**  
**ANTI-COMPETITIVE AND PRO-MONOPOLISTIC.**

The legislative history surrounding the Telecommunications Act of 1996 reveals that the purpose of the Act was to promote competition, especially among small businesses, and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies, particularly in rural markets. It is clear that the primary concern in the pay-per-call arena stemmed from toll free telephone number abuse. Public Law 104-104, 110 Stat. 56. Senate Bill 652.

Unfortunately, the clear intent of the proposed rule change is to relegate all interstate "Information" telephone transmissions to 900 service. It is undisputed that 900 services are already seriously dominated by AT&T. By forcing all information based transmissions to the 900 service arena, AT&T's dominance is magnified and promoted.<sup>6</sup> This is precisely the ill that deregulation sought to cure.

Moreover, 900 service lacks portability, a characteristic which is essential to insure access to all regional markets and thus promote, rather than inhibit, competition. It is well known that providers of information services rely heavily on customer loyalty to particular phone

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<sup>6</sup> Maybe it is no coincidence that AT&T is threatening to pull out of the 900 market. (See section V, below). After all, it has been waiting almost 7 years for the Commission to force the traffic in question into the 900 arena where it can further dominate industry. The timing of this request to "refresh the record" and AT&T's notice is extremely suspect.

numbers through advertising. Without portability, movement throughout the regional markets is eliminated and competition suffers. Ultimately, the consumer suffers as a result of the lack of options for the services they seek. Lack of portability is a bullet in the head of any provider attempting to locate to a new market or to change providers. It simply unnecessarily removes otherwise available choices.

It would truly be a shame to solidify AT&T's effective monopoly in the 900 service arena by forbidding competitors from having access to the same markets where these competitors can offer their services at the reasonable and customary long distance rates charged by AT&T and its brethren.

If all information services were relegated to 900 numbers or pre-subscription requirements, the result would be to effectively kill electronic commerce. A concrete example comes from Pennsylvania, which required all live information services to have formal written pre-subscription agreements. Ultimately, in the entire state, only 700 people signed up for pre-subscriptions. Pennsylvania has over 12 million people. This remarkably small number of subscriptions (.0075% of the population) is dramatic testimony to the fact that if consumers are overburdened with unnecessary regulations, there is a chilling effect on electronic commerce and free speech. Plainly, with such a small clientele, no audiotext provider could afford to serve Pennsylvania consumers.

Ultimately, the proposed rule stifles competition and legitimate economic enterprise. The overall economy benefits from efficiency. Volume commission arrangements allow audiotext providers to offer a service to consumers absent the exorbitant cost of 900-number services.

**IV.**  
**THE PROPOSED RULE CHANGE IS**  
**OVERLY BROAD AND UNDULY RESTRICTIVE.**

Information providers process over 5 million calls per month which translates into 30 million minutes per month in international calls alone. The rare complaints that surface regarding long-distance audiotext calls invariably involve the unauthorized use of a phone, e.g., where people break into phone rooms in apartment buildings or condominiums, or where a teenager makes a telephone call without parental permission. In reality, all long distance calls, domestic and international, are subject to this kind of isolated abuse whether the caller dialed an information line or their high school boyfriend going to school abroad. This sort of potential abuse is not a legitimate reason to relegate calls which are billed at customary and reasonable rates into the 900 number realm.

Modifying the definition of pay-per-call to include domestic and international information service long-distance calls billed at reasonable and customary rates set by independent long-distance carriers is illogical when considering non-deniability factors. There is absolutely no basis on which to distinguish 1+ or International information service calls from other long distance calls. Taken to its logical extreme, in order to make those calls non-deniable, all long-distance calls would have to be made non-deniable; that is, if the *real* motivation is to protect the sanctity of universal access to local phone service.

Moreover, modifying the definition of pay-per-call to include telecommunications services provided at reasonable and customary long-distance rates without charging the subscriber any premium whatsoever unreasonably restricts access to these services by the

general public in a number of ways. It is universally accepted that 900 access is more expensive to the subscriber because of the tremendous bad debt (charge backs) created by the deniable nature of the charge. Because of the tremendous bad debt write-offs, the providers must charge more for their services, resulting in an otherwise unnecessary additional expense to the consumer. As an example, under the current rules and regulations, a given provider can transmit its service to a subscriber through ATT in the evening at five cents per minute. AT&T and MCI, by agreeing to share twenty percent of its reasonable and customary charge for transmitting the call with the provider affords the provider the opportunity to service the subscriber at the customary long distance rate while at the same time realizing a profit.

The non-deniability of the charge encourages financial responsibility on the part of the subscriber and results in far less bad debt. In the 900-number arena, common carriers charge a premium for transporting 900 calls of approximately thirty-five cents per minute plus an additional ten percent for collection. Assuming a bad debt write off of fifty percent, which is not unusual in the industry, in order to offset the cost of providing the service, the provider of the service would have to charge the subscriber approximately ninety-one cents per minute, almost ten to twenty times the normal long distance rate. Recently a significant number of licensed exchange carriers have indicated their wholesale refusal to process any 900 numbers whatsoever.<sup>7</sup> Ultimately, consumers previously served by these carriers will go unserved, if the proposed regulations take effect.

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<sup>7</sup> AT&T has abandoned billing for most services and notified customers that they will be discontinuing transport as of December 31, 2003. (See section V, below.) MCI currently does not accept new applications for

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service. Sprint shut down its “900 Telemedia” office almost 10 years ago.

Additional market restrictions include the inability of the general public to access 900 service from pay phones. As a consequence, those who cannot afford or who do not wish to have their own phones are denied access to the services altogether. *Reno v. A.C.L.U.*, 117 S.Ct. 2329, 2337 (1997). The inability to access these services from a pay phone also eliminates caller anonymity as caller identity is revealed as a matter of course in a 900 call. Service through 900 is also unavailable at most hotels, businesses, pay phones and cellular and wireless phones, further restricting market access. Moreover, 900 numbers are inaccessible to callers from out of the country. The Commission's proposed actions will not only deprive foreign consumers access to the services, they will prevent domestic providers from capitalizing on the international market. This prohibits smaller U.S. carriers from capitalizing on niche markets in overseas territories that are still monopolistic or otherwise lagging behind the U.S. telecommunications markets in deregulation. Further, the Commission will restrict domestic providers from creating additional demand for U.S. goods and services in these international markets, especially as it relates to the promotion of tourism, software products and telecommunications equipment.

While the Companies support a consumer's right to understand his rights as far as information service billing, no other industry in America has been forced to render a bill advising the consumer that there will be little or no consequence for failing to pay his bill. Consumers intent upon defrauding the information services industry know quite well that any collection attempts outside of the phone bill are expensive, ineffectual, and heavily regulated at the state level, and, therefore, are not attempted and just written off by provider companies.

So overbroad is the proposed change, it will, if adopted, prohibit many of the current mechanisms for providing information based services at reasonable and customary long distance

rates. For instance, AT&T provides a service entitled Terminating Switch Access Arrangements (TSAAs) whereby AT&T makes payments to entities that received large volumes of calls over AT&T's network if the entity connects with AT&T's network through its dedicated access. Under the scheme, AT&T compensates the entity by paying it a percentage of the transmission charge for terminating the call. As AT&T is able to avoid the much higher terminating charge often imposed by the local exchange carrier, the subscriber entity enjoys a net reduction in its monthly phone charges, and the consumer benefits from the savings. These TSAAs are widely utilized by hospitals, educational institutions, airlines, financial institutions and other large organizations which routinely provide recorded and live information services over the phone. Although everybody benefits from this and similar types of arrangements, they would be illegal under the proposed scheme; something on the order of outlawing automobiles to prevent injuries caused by drunk drivers!

Perhaps the most serious over-breadth concern is the equating of "information services" with "pay-per-call services". Clearly, the two are not the same. Section 228(I) makes it clear that it is not the providing information service itself that Congress opposed. Instead, it was the unexpected charges imposed for those services as a consequence of the deceptive practices by unscrupulous providers that Congress sought to prevent. Clearly, the purpose of section 228(I) is to put the kibosh on the unscrupulous billing practices and not to prohibit the dissemination of information services. The FCC would be hard pressed to identify anywhere in the Act where Congress seeks to equate information services with pay-per-call. By redefining pay-per-call to include the presumption described in paragraph 48 of its proposed rule change, the FCC broadly paints all information services as pay-per-call, something that Congress obviously never

intended.<sup>8</sup>

## V.

### **900 SERVICE IS NOT AN OPTION.**

When Congress initially passed this bill, AT&T, Sprint, and MCI all offered 900 services. AT&T is now in the process of withdrawing its product, and MCI and Sprint will no longer sign up new customers. AT&T has abandoned billing for most 900 services and notified customers that they will be discontinuing transport 900 numbers as of December 31, 2003. For example, in a letter dated April 7, 2003, AT&T told its 900 providers that it would discontinue its AT&T MultiQuest 900 service by December 31, 2003. In a similar vein, MCI currently does not accept new applications for service.

It makes no sense to change the definition of pay-per-call if the result is to force conversion to 900 numbers, and then announce that 900 service will not be available. A company should not be forced into the 900 platform which, in short order, will not exist.

Further, competitive local exchange carriers (“CLECs”) are blocking access to 900 numbers. Several million customers in the country now get their phone service with UNE-P and therefore don't have access to 900 anymore. The number of lines served by UNE-P are growing everyday, and there is every indication that the numbers will continue to grow, further exacerbating the lack of access to the 900 platform. In the end all that will be left is pre-subscription and credit card, leaving access to these types only to those with a credit card, and

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<sup>8</sup>The proposed rule would, for instance, outlaw a bank's “mortgage informative hotline” if the bank were receiving any volume discounts or payments under a TSAA or similar agreement as described in section IV above.

those willing to go through the bother and lack of privacy inherent in the pre-subscription arena.

For the foregoing reasons the FCC should abandon the plans to redefine the term “pay-per-call.”

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Joseph G. Dicks  
Attorney for  
HFT, LO-AD COMMUNICATIONS,  
T.B.I., and GLOBAL CHARGE  
Law Offices of Joseph G. Dicks, APC  
750 B Street, Suite 2720  
San Diego, CA 92101  
(619) 685-6800  
(619) 557-2735 *facsimile*  
email: [jdicks@jgdlaw.com](mailto:jdicks@jgdlaw.com)

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